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SEP 23 1954

HAROLD B. WILLEY, Clerk

Supreme Court of the United States

No. 360

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner and Appellant Below,

versus

MACK HENRY JOHNSON,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Of Counsel.

HAUSER PRINTING CO., INC., NEW ORLEANS

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Supreme Court of the United States

No. .....

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner and Appellant Below,

versus

MACK HENRY JOHNSON,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associates Justices of the Supreme Court of the United States:

Louisiana & Arkansas Railway Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on June 30, 1954.

I.

CITATION OF OPINIONS BELOW

There is no report of an opinion of the United States District Court for the Eastern District of Louisiana in this matter.

The opinion of the United States Court of Appeals for the Fifth Circuit[1] is reported in 214 F. 2d 290.

[1] Appendix A.

II.

STATEMENT OF JURISDICTION

(i) The decree sought to be reviewed was entered June 30, 1954.

(ii) Application for rehearing was filed July 20, 1954, and denied July 30, 1954. An order to stay the mandate for sixty days from July 29, 1954, was entered August 6, 1954.

(iii) The statutory provision that confers on this court jurisdiction to review the decree in question, by writ of certiorari, is 28 U.S.C. Sec. 1254 (1).

III.

QUESTIONS PRESENTED

1. Whether the trial court should permit plaintiff to testify to what he was told an hour and a half prior to the accident in question by a party since deceased (being the only testimony on the subject) to justify and explain his violation of railroad operating rules, which if enforced, would have averted the head-on collision of two passenger trains, in which he was allegedly injured.

2. Whether a trial court may properly exclude the record of plaintiff's service over a period of thirty years, showing frequent reprimands and four dismissals for cause, which petitioner sought to introduce in refutation of plaintiff's contention that he was a good employee, dismissed without cause, and in support of medical testimony that consideration of a pre-traumatic personality was of great importance in determining the existence and extent of the traumatic neurosis allegedly suffered by plaintiff.

3. Whether a number of physicians should be permitted to repeat on the witness stand what plaintiff told them about the accident itself.

IV.

THE STATUTES INVOLVED

This case was based upon Act of April 22, 1908, as amended, 35 Stat. 65 et seq.; U. S. Code Title 45, Secs. 51-59.[2]

V.

STATEMENT OF THE CASE AND REASONS RELIED ON FOR ALLOWANCE OF WRIT

A.

Improper Admission of Hearsay Evidence

The accident in question occurred as a result of the violation of operating rules by one or more of appellant's employees on the northbound train involved in the collision. Petitioner contends that the accident would not have occurred had plaintiff obeyed the applicable rule.[3] Plaintiff was permitted to testify over petitioner's objection[4] that the conductor had told him an hour and a half previously,[5] that the trainmaster, in violation of the

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[2] Federal Employers Liability Act, Tr. p. 2.

[3] The northbound train on which plaintiff was the rear brakeman, was required by the time table to take a siding so that it would be off the track ten minutes before the southbound train was due. Rule 90 provides that if the Engineer and Conductor do not "stop short of the fouling point" that "firemen, brakemen, and other members of the crew will also be held responsible for failure to take immediate action to stop the train." Rule 107 repeats this requirement and prohibits brakemen from complying "with any instructions which imperil the safety of the train or involve a violation of the Rules." Plaintiff's Ex. 3, Defendant's Ex. 18 and 19, Tr. pp. 821, 822, 823, 826, 827, 835, 468, 466, 469, all of which is summarized in the second paragraph of the opinion of the Appellate Court herein (Appendix A).

[4] Tr. pp. 413-418.

[5] Tr. pp. 413 to 418. Conversation occurred at Essen just after the train stopped at 5:26 A.M. (Request for admission No. 27, Tr. p. 38, and answer Tr. p. 61). The accident occurred at 7:02 A.M. Tr. p. 120.

rules, was operating the train by use of the train radio in the locomotive, and that because of this conversation he did not take steps to stop the train pursuant to the rules, which would have averted the collision. The conductor had been killed in the same accident in which plaintiff was allegedly injured.[6]

The Appellate Court held the hearsay evidence of which petitioner complains, to be admissible as a verbal act. Mr. Justice Minton, in considering a similar question took the contrary view.[7]

This Court denied certiorari in a case which reprobated as prejudicial error the admission of hearsay evidence not within one of the recognized and established exceptions[8] and held that the basis for the exclusion of hearsay lies in the fact that it is not subject to the fear of perjury or the tests ordinarily applied to the ascertainment of truth by cross-examination, which is essential to the administration of justice.[9]

The Appellate Court, in deciding the case at bar, relied on a text, not appropriate, and two cases.[10] In the first of the cases[11] the evidence was admitted under a specific statute, and was therefore not applicable,

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[6] Request for admission No. 21, and answer, Tr. pp. 36, 59. See also Tr. p. 314.

[7] *Hill v. A. J. Canfield Co.*, 157 F. 2d 849 (CCA 7).

[8] *Reliance Life Insurance Co. v. Burgess*, 112 F. 2d 234, cert. den.; 311 U.S. 699, 85 L. Ed. 453.

[9] *Donnelly v. United States*, 228 U.S. 243, 708, 57 L. Ed. 820, 1035; *Cucullu v. Hernandez*, 103 U.S. 104, 26 L. Ed. 322. See also *Gomila, et al v United States*, 146 F. 2d 372 (CCA 5); *Quercia v. United States*, 289 U.S. 466, 470, 77 L. Ed. 1321, 1325; *Hunter v. United States*, 62 F. 2d 217; *Sacramento Suburban Fruit Lands Co. v. Parker* (CCA 9) 36 F. 2d 926; *Mason v. United States*, 63 F. 2d 791; *Williams v. United States*, 93 F. 2d 685; *Moscahlades, et al v. Montagnio*, 172 N.Y.S. 332.

[10] VI Wigmore on Evidence, 3d ed., Secs. 1714, 1715, 1788, 1789; *Petroleum Carrier Corp. v. Snyder*, (CCA 5) 161 F. 2d 325; *Reading Co. v. Larkin*, (CCA 3) 114 F. 2d 416.

[11] *Petroleum Carrier Corp. v. Snyder*, (CCA 5) 161 F. 2d 325.

and in the second[12] it was said that: "The qualifications which render the incidence of a litigated act admissible are 'that they are part of the immediate preparations for or emanations of such act * * * .'" In any event, the rule as applied by the Appellate Court has been rejected by this Court.[13]

B.

Exclusion of Plaintiff's Work Record

Plaintiff, aged 63 at the time of the accident, claimed that he suffered physical injury and a traumatic neurosis, which he claims resulted in a loss of potency. The orthopedists, including his own, testified that his injuries, orthopedically, were minute.[14] Defendant sought to introduce plaintiff's work record,[15] and when it was excluded, entered an offer of proof.[16] This evidence was improperly excluded because:

> (a) As plaintiff's leading psychiatrist admitted,[17] a predisposition to nervousness has a part in the traumatic neurosis, and a person with a pre-existing nervous condition is much more likely to suffer such a neurosis. In determining the existence of a traumatic neurosis, it is necessary to take into account the pre-traumatic personality.[18]
>
> (b) Petitioner was unable to satisfactorily meet and answer the impression that plaintiff endeavored to, and apparently succeeded in conveying to the jury, that he was an able, efficient, loyal employee, steadfast in his devotion to duty.

Such work record was not only important to

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[12] *Reading Co. v. Larkin*, (CCA 3) 114 F. 2d 416.
[13] See Note 9 *supra*.
[14] Tr. pp. 278, 237, 892.
[15] Tr. pp. 476 to 479 and 571 to 576, copied herein as Appendix B.
[16] Tr. p. 575.
[17] Tr. p. 524.
[18] 30 Va. Law Review 87, 90.

show plaintiff's pre-traumatic personality but also to refute the false impression that was created in the minds of the jury as to the efficiency and capabilities of this man. It shows that he was reprimanded or given demerits for responsibility in connection with accidents on ten occasions prior to the accident in question. He was dismissed from service for cause and re-employed four times before the accident in question. On the last occasion his dismissal from service was for violation of "Rule G", which, as was shown by the offer of proof,[19] was the rule which prohibited the use of intoxicating liquors on duty.

The magnitude of the award could only have resulted from a misconception by the jury of the extent of plaintiff's alleged injuries. We respectfully submit that the exclusion of this important evidence, which was properly admissible in view of the contention of plaintiff that he had suffered a traumatic neurosis and was improperly discharged without cause[20] after thirty years of continuous service,[21] was a grievous blow to petitioner, and grossly improper.

This Court has said that courts should be careful in the administration of the law of evidence not to shut out the truth;[22] that facts proved by way of circumstantial evidence may be explained by the defense;[23] and that if evidence conduces in any reasonable degree to establish the improbability of the fact in controversy, it should go to the jury.[24]

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[19] Tr. p. 575.

[20] P. Ex. 26, Tr. pp. 403, 404, 428.

[21] Tr. p. 403.

[22] Cliquot's Champagne, 70 U.S. 114, 3 Wall. 114, 18 L. Ed. 116.

[23] *National Bank of the Metropolis v. Kennedy*, 84 U.S. 19, 17 Wall. 19, 21 L. Ed. 554.

[24] *Home Ins. Co. v. Weide*, 78 U.S. 438, 11 Wall. 438, 20 L. Ed. 197. See Also: *Union Oil Co. of California v. Hunt*, 111 F. 2d 269, 278 (C.C.A. 9).

C.

Admission of Repetitive Hearsay By Physicians

Appellant objected[25] to the court permitting several of the doctors who testified, to recite the history[26] that plaintiff repeated to them, including certain facts in connection with the accident, not connected with his physical condition. As undesirable as this practice is, when done by one physician, the error is compounded by the constant repetition. It would be difficult indeed for a juror to be able to differentiate between fact and unsupported statements which were constantly reiterated by responsible individuals, who in fact were only repeating what plaintiff told them. As Dr. Connelly said,[27] the stories told by plaintiff to each of these doctors had a parrot-like similarity, and we respectfully submit that a constant repetition of a statement creates a tendency on the part of the hearer to believe it to be true. In this instance and under these circumstances, we believe that it was material error for the court to have permitted these eminent members of the medical profession to repeatedly recite plaintiff's story.

This Court, in an identical case, said that it should appear beyond a doubt that the error complained of did not and could not prejudice the rights of the party objecting.[28] The reception of such testimony has been repeatedly reprobated by the courts.[29] The Appellate

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[25] Tr. pp. 202, 203.
[26] Tr. pp. 203, 212, 213, 225, 506, 766, 767.
[27] Tr. p. 685.
[28] *Boston and Albany R.R. Co. v. O'Reilly*, 158 U.S. 334, 39 L. Ed. 1006.
[29] *Deery v. Cray*, 72 U.S. 5 Wall. 795, 18 L. Ed. 653; *Gilmer v. Higley*, 110 U.S. 47, 28 L. Ed. 62; *Flannagan v. Provident L. & A. Ins. Co.*, 22 F. 2d 136 (C.C.A. 4, 1927); *Altmayer v. Travelers Protective Ass'n of America*, 119 F. 2d 1005, 1008; *Cardwell v. U. S.*, 186 F. 2d 382, 386 (C.C.A. 5) Annotation 130 A.L.R. 978; *Chicago & N. W. R. Co. v. Garwood*, 167 F. 2d 848 (C.C.A. 8); VI Wigmore on Evidence, 3rd ed. Sec. 1722; 26 Tulane Law Review 375.

Court in its opinion, said that the testimony was not objected to on the ground that it was hearsay. The objection read as follows:

> "We would like to note an objection to the doctor reading into the record each time what the plaintiff told him."

The word hearsay was not used, but to object to a recitation of what plaintiff told the witness can be nothing but an objection to hearsay. This Court decided in an identical case that the objection to hearsay was implicit in the one made.[30]

We therefore respectfully submit that the rule applied by the Appellate Court was incorrect, and the reason given therefor erroneous.

CONCLUSION

Petitioner respectfully submits that the United States Court of Appeals for the Fifth Circuit, in the respects above mentioned, has so far sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

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JOSEPH R. BROWN,
ELIZABETH R. HAAK,
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Of Counsel.

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[30] *Sparf v. U. S.*, 156 U.S. 51, 39 L. Ed. 343, 345. See also *Carver v. United States*, 160 U.S. 553, 40 L. Ed. 532; *Nudd v. Burrows*, 91 U.S. 426, 23 L. Ed. 286.

APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 14970

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Appellant,

versus

MACK HENRY JOHNSON,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(June 30, 1954.)

Before HUTCHESON, Chief Judge, RIVES, Circuit Judge, and DAWKINS, District Judge.

RIVES, Circuit Judge: In an action under the Federal Employer's Liability Act,[1] appellee recovered a judgment on a jury's verdict in the amount of $28,000.00 for personal injuries suffered in a collision between two of the appellant's trains at a point 1.67 miles north of Lettsworth, Louisiana, on August 10, 1951. Appellee was the rear brakeman on a troop train running northward when it collided head on with a streamlined passenger train traveling southward. The trainmaster who was riding on the northbound train and the other four members of the crew of that train and eight other persons

[1] 45 U.S.C.A. 51-59.

were killed and 69 injured in the collision. Appellee was riding on the rear platform of the last car and jumped just before the impact.

Under the rules of the railroad, the northbound train should have taken a siding so that it would clear the time of the southbound train by at least 10 minutes. The rules further provided that, if the train did not take such siding, the conductor would take immediate action to stop the train, and the firemen, brakemen and other members of the crew would also be held responsible for failure to take immediate action to stop the train. The last siding that the northbound train could have taken so as to clear the time of the southbound train by as much as 10 minutes was at Batchelor, Louisiana, approximately 6.9 miles south of Lettsworth. There was also a switch track at Lettsworth onto which the train might have been moved in time to avoid the accident, but not in time to clear the full 10 minutes pursuant to the rules.

Appellee contended that the collision occurred as a result of the negligence of the trainmaster who was riding on the engine of the northbound train and, according to appellee, had taken over its operations; and, if not from the sole negligence of the trainmaster, then as a result also of the concurring negligence of the engineer and conductor of the northbound train. Appellant asserted as a defense that the appellee was guilty of negligence which was the sole cause of the collision, or in the alternative in diminution of damages that the appellee was guilty of contributory negligence. The appellant also denied that the injuries received by the appellee were serious and claimed that his only injury was a sprained ankle.

On this appeal the appellant complains of the refusal of one of its requested instructions to the jury, that a part of the charge to the jury was erroneous, that the court made erroneous rulings on the evidence, permitted improper argument by appellee's counsel, made erroneous statements prejudicial to the appellee, and in general did not conduct the trial with the air of impartiality to which every litigant is entitled.

The instruction refused read as follows:

> "Where a trainman has a personal duty to perform under the operating rules of the defendant railroad and fails in that duty, as a result of which he is injured, he is not entitled to recover under the Federal Employer's Liability Act, notwithstanding the fact that it was also the duty of other members of the crew to watch for an approaching train with which his train collided, and that their negligence may have contributed in a proximate way to the injury of the plaintiff."

As requiring the giving of this instruction, appellant cites the cases of *Unadilla Ry. Co. v. Caldine*, 278 U.S. 139, and *Southern Ry. Co. v. Youngblood*, 286 U.S. 313, to which we may add the case of *Davis v. Kennedy*, 266 U.S. 147. All of these cases were decided before the 1939 amendment to the Federal Employer's Liability Act, now brought forward as 45 U.S.C.A. 54, did away with the defense of assumption of risk. At that time, the so-called "primary duty rule" was applied to the conductor in *Unadilla Ry. Co. v. Caldine, supra*, and *Southern Ry. Co. v. Youngblood, supra*, and to the engineer in *Davis v. Kennedy, supra*. Following the enactment of the 1939 amendment, the Supreme Court held that "every vestige of the doctrine of assumption of risk was obliterated from the law" and that the "primary

duty rule" in *Unadilla Ry. Co. v. Caldine, supra,* and *Davis v. Kennedy, supra,* had been "swept into discard". *Tiller v. Atlantic Coast Line R. Co.,* 318 U.S. 54, 58, 63, 64. Since that decision, in cases arising under the Federal Employer's Liability Act, even the engineer has been held not barred by the "primary duty rule", *Atlantic Coast Line R. Co. v. Mangum,* 34 So. 2d 848; *Atlantic Coast Line R. R. v. Anderson,* 38 S.E. 2d 610, see also *Keith v. Wheeling & L.E. Ry. Co.,* 6th Cir., 160 F. 2d 654, 657. We hold, therefore, that there was no error on the part of the district court in refusing to give the appellant's requested charge, nor in the part of its oral charge on the same subject; but that, to the contrary, the court probably charged the jury more favorably to the appellant than it was entitled in submitting to the jury the issue of whether the appellee's negligence was the sole proximate cause of the accident.

We have carefully examined the record in this case, and, while it may be that the learned district judge at times showed some impatience or irritation with the claim of a total defense which did not exist in point of law, we are further impressed with his fairness, and we cannot sustain the appellant's contention that its case was prejudiced by any claimed unfair manner in which the trial was conducted. No objection was taken to any of the remarks complained of and we have no further occasion to consider such remarks. *Dowell, Inc. v. Jowers,* 5th Cir., 182 F. 2d 576, 579.

The appellee testified that as the northbound train was going around the curve on which the collision occured, he was leaning out looking forward on the train for possible "hot boxes" when he noticed the southbound train and the imminence of the collision. Someone had

applied the emergency brakes before he could do so. Accordingly, he jumped, did a double somersault and hit the ground. The appellee was between 63 and 64 years of age. His physical injuries at the time did not seem serious and did not prevent his performance of his flagging duties nor his getting back to Lettsworth to notify the dispatcher of the tragic accident. He was, however, hospitalized after the accident and several reputable psychiatrists testified that he had suffered a severe nervous shock, a traumatic neurosis, which in their opinion permanently and totally disabled him and also rendered him nervous, depressed and impotent. The claim that the verdict was for an excessive amount does not present a question for re-examination here. *Atlantic Coast Line R. Co. v. Burkett*, 5th Cir., 192 F. 2d 941, 945, and cases there cited.

Appellant strenuously insists that the court erred in permitting the appellee, over the appellant's objection, to relate his conversation with the conductor, afterward killed in the accident, when the northbound train stopped a few miles south of Baton Rouge. The train was due to take a siding at Essen, Louisiana, for still another train of the defendant known as No. 9, which was a superior train and had the clearance and right-of-way over the northbound train. Instead, the train passed the siding at Essen and later stopped, at which time Mr. B. T. Moore, the trainmaster, used the radio equipment to contact the appellant's operator at Baton Rouge and to order that No. 9, the superior train, remain in the station until the northbound train had arrived. Over the appellant's objection, the appellee was permitted to testify that he asked the conductor, who was later killed in the accident, why the northbound train did not stop at Essen, and was told by the conductor that the train-

master was with the engineer at the head of the train, had a radio and was running the train up there, and that they knew what they were doing, but the conductor did not. That conversation, we think, was admissible as circumstantial evidence going to show the method of operation of the train on this fatal journey by the trainmaster. It was really a verbal act relevant to be considered in determining the negligence *vel non* and the degree thereof on the part of the conductor and also on the part of the appellee. VI Wigmore on Evidence, 3d. ed., Sections 1714, 1715, 1788, 1789; *Petroleum Carrier Corp. v. Snyder*, 5th Cir., 161 F. 2d 325; *Reading Co. v. Larkin*, 3d. Cir., 114 F. 2d 416.

Appellant insists that the district court erred in not admitting appellee's work record kept by the appellant and which showed various infractions of the rules by the appellee during the course of his employment from 1919 to 1951. The appellant contends that the work record is material and relevant to the issue of whether or not the appellee had a pre-existing neurotic condition. It would, no doubt, have been proper for the skilled phychiatrists to take that word record into consideration in diagnosing the appellee's condition and the cause thereof, but very clearly, we think, the record without explanatory evidence would have been of no help to the jury. The trial, which consumed five days time, probably would have been extended over several days more in taking evidence as to each of the particular charges, demerits and reprimands shown in this work record. There was no abuse of discretion on the part of the court in excluding it.

Appellant urges that the district court erred in permitting several of the doctors who testified to recite the

history that appellee repeated to them. The appellant did not object to such history as given by the first doctor who testified, but did object to its continued repetition. Evidence as to what a patient has told a doctor for the purpose of medical treatment is admissible as an exception to the hearsay rule. *United States v. Calvey*, 3d. Cir., 110 F. 2d 327, 330. Such evidence may not be admissible if made by a patient to a physician not for the purpose of treatment but to qualify the physician to testify as an expert witness. *Atlantic Coast Line R. Co. v. Dixon*, 5th Cir., 207 F. 2d 899, 903. The testimony was not, however, objected to on that ground, but the sole complaint was to the repetition of appellee's statements, a matter resting, we think, within the sound discretion of the district judge.

Appellant's investigation in preparing its defense included placing the appellee under the surveillance of a detective, who admitted on cross-examination that he tried to induce the appellee to drink alcoholic liquors when the appellee had expressed a preference for soft drinks. There was also evidence that appellant's chief surgeon, at the direction of its vice-president, had reprimanded its division surgeon for giving the appellee a statement to the Railroad Retirement Board that he needed retirement on account of shock and injury to his ankle. Appellee's counsel, in arguing the case to the jury, stated in part: "Now in this case you will note that the plaintiff was dealing with a very, very resourceful defendant; a defendant which in many respects would stop at nothing; a very resourceful defendant." The district court overruled appellant's objection to this argument. In the part of the argument immediately preceding, counsel for the appellee had commented on the employment and conduct of the private detective and

immediately following he commented on the reprimand to the doctor. We cannot say, under the circumstances of this case, that the district court abused its discretion in overruling the objection to this argument. That was the only objection made to the argument which is set out in full in the transcript, and which, as a whole, was a fair though vigorous presentation of the issues. Finding no error in the record, the judgment is

AFFIRMED.

APPENDIX B

ICC Form 1441—1934—12-20-35
L&A Form 400

TRANSCRIPT OF RECORD OF EMPLOYEES

L&A PR-4166 12-15-19
(Date this form was completed)

Full Name JOHNSON - MACK HENRY Social Security No. 703-18-2372

Birthdate 2-23-94 Birthplace Wakefield, Louisiana.

CLASS	EDUCATION. NAME AND LOCATION OF SCHOOL OR COLLEGE	DESCRIPTION.	DEPENDENTS. NAME AND RELATIONSHIP	AGE
8	Grade	Nationality? American	Lavinia, wife	
		White or Colored? Colored	Murry, son	
		Male or Female? Male		
		Citizen? Yes		
		Married? Yes		
		Height? 5 ft. 8 in.		
		Weight? 185 lbs.		
		Color Eyes? Black		
		Color Hair? Black		
		Identifying Marks? None		

Employer's release submitted: Adult
ICC-1 submitted: Yes
Insurance application submitted: Not Eligible

If any relatives in service of this Company give names:

DATE EMPLOYED 2- -15 As Brakeman (P&M) Department Transportation

DATE	
- -19	Resigned.
-15-19	Re-employed by L&A as brakeman.
-11-20	Louisiana Flagging Rules examination.
-18-21	MoPac. Transportation Rules examination - Certificate #98.
-28-21	Louisiana Flagging Rules examination.
-16-22	Louisiana Flagging Rules examination.
-17-23	Louisiana Flagging Rules examination.
- 9-24	Reprimanded for failure to show up for Train #27, September 2, 1924 and instructed that he must move closer to his work.
-15-24	Louisiana Flagging Rules examination.
-30-25	Louisiana Flagging Rules examination.
- 4-25	Hours of Service Law examination.
-27-26	Louisiana Flagging Rules examination.
-18-27	Issued MoPac Book of Rules #13730.
-20-27	Louisiana Flagging Rules examination.
-28-27	Reprimanded for his responsibility in accident, L&A 2663, UTLX 23615, 23960 and 23649 derailed, north leg of wye, Stampa, 9-28-27. AL-701.
-11-28	Louisiana Flagging Rules examination.
- 6-29	Reprimanded for his responsibility in accident, PRR 35883 derailed, Hope, Train #25, Engine #506, May 24, 1929. AL-949.
-10-29	Louisiana Flagging Rules examination.
-23-29	Issued MoPac Book of Rules #8090.
-29-29	Issued Switch Key L&A #3877 in exchange for worn out key without number.
- 9-30	Issued Book of Rules #L&A-547.
-15-30	10 demerits for his responsibility in accident, MPCX 69, GATX6641, coming head gasoline, damaged at Cotton Valley, Train #25, Engine #509, 1-15-30. AL-3284.
- 5-30	10 demerits; five for his responsibility in accident, damage to trailer of Ford truck, Cotton Valley, Train #Extra North, Engine 506, North, 4-19-30; and 5 for not reporting accident to Conductor. AL-495.
- 4-30	Louisiana Flagging Rules examination.
-25-30	Dismissed from service account responsibility for personal injury to passenger, October 10, 1930, Train #25.
-24-31	Re-instated with full seniority rights.
-23-32	5 demerits for failure to have watch inspected first period of March, 1931.
	5 demerits for his responsibility in accident, L&A 18088 cornered by PFE 25455, Hope, Train #15, Engine #556, 1-29-32. AL-1033.
-16-32	Reprimanded for failure to have watch inspected second period February, 1932.
- 6-33	"A" rating on physical examination.
- 4-34	Issued book of Rules #SA-6101.

(over).

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APPENDIX B

7-16-34 - L&A Transportation Rules examination - Certificate #86.
8-19-36 - Reprimanded for his responsibility in accident, cars knocked over derail, Sibley, Train #81, 8-1-36. AX-2556.
12- 8-36 - Reprimanded for his responsibility in accident, KAMV crossing gate broken at Sibley by Extra 552 North, November 28, 1936.
9-19-36 - Participated in strike of Train, Yard and Enginemen.
11-22-36 - Returned to service - strike settled.
11-23-36 - Issued Switch Key #5488 in exchange for old key #3866-S.
1-14-37 - "A" rating on physical examination.
6-12-37 - 5 demerits for failure to have watch inspected first period January, 1937.
7-16-38 - Relieved from service for inattention to his duties and passengers, Train #8, Shreveport, 8-15-38, "visiting" with other negroes standing around on station platform and failing to comply with instructions of Superintendent to pay attention to his work.
7-27-38 - Re-instated.
8-29-38 - 20 demerits for his responsibility in accident, main line switch run through, Train #4, 8-1-38, Paokton. AX-3225.
3-23-39 - Relieved from service as Porter on Trains 2-3 and 4-1 account failure to properly perform duties as train porter; permitted to go back in freight service on Train 41, Shreveport to Filston, and 42, Filston via Minden to Shreveport.
10-10-39 - 5 demerits for failure to have watch inspected second period May, 1939.
2-23-40 - Instructed to report to Chief Surgeon for physical examination before March 15, 1940.
3-11-40 - Reported for physical re-examination - Given 4-1 rating account eyes need re-checking, teeth need attention and needs re-vaccination. Instructed to have this attended to immediately.
4-19-40 - Dismissed from service for villation of Rule G and absenting himself from duty without permission, April 14, 1940.
10-17-40 - Re-employed ad Brakeman - New Orleans, Louisiana. Issued the following Company property: L&A Switch Key #5881; T&P Switch Key #9606; L&A Rule Book #1016; T&P Rule Book #3280. / 3-19-41 Passed T&P Rules Exam. issued Certificate No. 415.
10- 7-41 - Passed L&A Transportation Department Rules examination - Certificate No: 402.
9- 9-42 - 5 demerits forfailure to have watch inspected during second period April, 1942.
4- 1-43 - 10 demerits: 5 demerits for failure to have watch inspected second period August 1942 and 5 demerits for not answering correspondence.
9- 7-43 - Complaint from White System of New Orleans, Inc., for balance of $56.44 due them.
2-23-45 - 5 Demerits for his responsibility in accident 10:10 A.M., January 4, 1945, Train No. 35, Engine 508, when C&O 11360, empty box, was sideswiped by L&N 54385 and 43232 at North end of Old Pass. AX-8998.
5-23-45 - Issued four large Brakeman's Buttons and ACS Coach Key, unnumbered.
8-27-45 - Issued L&A Coach Key No. 906 in exchange for coach key turned in account worn out.
1-15-46 - Qualified on Transportation Rules.
2- 8-47 - 25 Demerits. Responsibility AX-7742, Lobdell, Train #37, 1/21/47.
6-17-48 - 5 Demerits. Watch Inspection Failure, March, 1948.
8-20-51 - Dismissed, as per Supt. R. Norwood's letter that date, file AX-9251, for responsibility in connection with headon collision between Extra 51A North and No. 1 near MP 738 north of Lettsworth, La., August 10, 1951, while working as rear brakeman on Extra 51A North out of New Orleans August 10, 1951.

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED SEP 8 1953

Dep. Clerk

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Supreme Court of the United States

No. 360

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner,

versus

MACK HENRY JOHNSON.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR MACK HENRY JOHNSON IN OPPOSITION.

OPINION BELOW

The opinion of the Court of Appeals is reported at 214 F. (2d) 290.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1954, and application for rehearing was denied on July 30, 1954. The order to stay the mandate for sixty days from July 29, 1954, was entered on August 6, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court properly permitted plaintiff to testify what he was told by the conductor, an agent of the defendant railroad while in the scope of his employment, shortly before the accident as to the method of operation of the defendant railroad, which method of operation corroborated by other evidence not objected to was responsible for the accident in which plaintiff was injured and where the defendant, in cross-examination of plaintiff and direct examination of defendant's own witness, asked questions concerning the same subject matter.

2. Whether the trial court properly exercised its discretion in excluding hearsay evidence as to alleged past acts of plaintiff which acts could not possibly have any bearing on the question of negligence or any other issue in this case.

3. Whether the trial court properly permitted evidence by doctors as to symptoms of traumatic neurosis where the only method of showing traumatic neurosis is by subjective symptoms and where defendant did not object to such testimony by the first doctor testifying and where the objection of defendant was based on repetition and not hearsay and where defendant asked plaintiff's doctors on cross-examination and defendant's doctors on direct examination to reiterate the subjective symptoms as told them by plaintiff.

STATUTE INVOLVED

This action is under the Act of April 22, 1908, as amended, 35 Stat. 65 et seq.; U.S. Code Title 45, Sections 51-59 (Federal Employer's Liability Act).

STATEMENT

This is an action under the Federal Employers Liability Act (U. S. C. Title 45, Secs. 51-59) to recover damages for serious personal injuries suffered by the respondent, Mack Henry Johnson, as a result of the negligence of the petitioner's employees, other than the respondent, in a collision between two of the petitioner's trains (Extra 51-A North and Southern Belle No. 1) at Lettsworth, Louisiana on August 10, 1951.

Extra 51-A North, as the name implies, was an extra train which had no regular schedule and it was inferior to the Southern Belle No. 1, which was operated on a regular schedule. (Tr. p. 826)

A chart that was introduced in evidence (Pl. 1, Tr. p. 79) shows the location of the wreck and the relevant information as to distances and the curvature of the roadway near the point of collision. The wreck took place 1.67 miles south of Lettsworth, Louisiana. The Southern Belle No. 1 had a complete crew, all of whom were killed, and Extra 51-A North, the train on which the respondent was riding, aside from having a complete crew, also had aboard B. T. Moore, the trainmaster. The trainmaster, and all members of that crew, with the exception of the respondent, were killed.

In the instant case the petitioner asserted as a defense that the respondent was the sole cause of the collision and, in the alternative, that the respondent was guilty of contributory negligence, which was the proximate cause of the collision.

On February 11, 1953, Mrs. Irene Booth Moore, surviving widow of B. T. Moore, the trainmaster who was

aboard Extra 51-A North at the time of the collision, filed suit against the petitioner in the United States District Court for the Western District of Louisiana, Shreveport Division, Civil Action No. 3995, (Pl. 2, Tr. pp. 40-D to 40-K), and the petitioner filed its answer on April 11, 1953 (Pl. 2, Tr. pp. 40-K to 40-O). In the answer filed by the petitioner in the B. T. Moore case, it set forth that B. T. Moore was solely responsible for the collision, in answer to paragraph 8 (Pl. 2, Tr. pp. 40-F and 40-L). Also, in answer to paragraphs 13 and 14, the petitioner denied that the conductor of Extra 51-A North was at fault (Pl. 2, Tr. pp. 40-G and 40-L). In answer to paragraph 15 (Pl. 2, Tr. pp. 40-G, 40-H, 40-L, and 40-M), the petitioner admitted " * * * that the negligence of Benjamin T. Moore, agent, representative and official of defendant on said train Extra 51-A in failing to do what he should have done was the cause of the accident." In answer to paragraph 16 (Pl. 2, Tr. pp. 40-H and 40-M) the petitioner denied that the place given Moore to work was not reasonably safe and " * * * that the operation of the trains was hazardous, except so for as the said Moore himself made the place furnished him an unsafe place and made the operation of the trains hazardous." In answer to paragraph 18 (Pl. 2, Tr. pp. 40-H, 40-I, and 40-M), the petitioner admitted that " * * * through its employees it was operating the two trains referred to in the complaint, and in particular, it admits that through its agent, representative and official, Benjamin T. Moore, it was in control of Extra 51-A; * * * " In paragraph 27 (Pl. 2, Tr. p. 40-N) the petitioner alleges "that the collision between the two trains referred to in the complaint was due solely to the negligence of Benjamin T. Moore, respondent's deceased, in failing to perform his responsibilities and duties to see that the operating rules and special rules and instructions in the

movement of train Extra 51-A North were complied with. Such duties were his responsibility and only his responsibility. To perform them was the reason that Trainmaster Moore was instructed to ride this train. These duties and responsibilities could not be delegated by him to members of the crew." In paragraph 28 (Pl. 2, Tr. p. 40-N) the petitioner plead in the alternative in the *Moore* case that if the petitioner was guilty of any negligence in the operation of Extra 51-A North because of the actions of any of its employees, he was barred from recovery on the ground of contributory negligence of Benjamin T. Moore in failing to perform his duties as set out in paragraph 27 of its answer; and, alternatively, it plead that because of Moore's contributory negligence, the damages that could be recovered should be diminished in proportion to the amount of negligence attributable to Moore.

Thus, in an action in the Federal Court by the widow of the Trainmaster who was aboard Extra 51-A North at the time of the collision, the petitioner asserted affirmatively that Moore was the sole and only person responsible for the collision and the answer in that suit was filed subsequent to the petitioner's answer in the instant case wherein it set forth the alleged negligence of the respondent.

On August 10, 1951, Extra 51-A North departed from the West Yard, New Orleans, Louisiana, at about 3:15 a.m. (Tr. p. 406) On Board was the trainmaster, B. T. Moore, (Tr. pp. 303, 304, 404) whom the crew considered and recognized as the boss. (Tr. p. 411) No train order was valid unless it bore the initial "B.T.M.". (Tr. pp. 303, 304, 828-A) The conductor (Tr. p. 404), the skipper of the train, the engineer, (Tr. p. 405) the

front brakeman (Tr. p. 405), the fireman, (Tr. p. 405) and the respondent were aboard. Also aboard was J. W. Sandifer, (Tr. p. 405) passenger representative of the petitioner (Tr. p. 291), who reported only to the president of the Company. (Tr. pp. 291, 292) In New Orleans it was decided that since B. T. Moore was going to ride in the cab with the engineer, (Tr. pp. 294, 295) that the conductor would ride the rear of the train. (Tr. p. 294)

Before Extra 51-A North left the West Yard at New Orleans, B. T. Moore had a conversation with the telegraph operator. Moore told the operator to tell the dispatcher to give an order in reference to another train, not involved in this collision, which order was given. Moore also called the operator at Simmesport and told him to have his watch card and things ready so that he could inspect them. Moore was in possession of the Simmesport operator's watch, that had been cleaned, and he was going to hand it to the operator as the train passed Simmesport. (Tr. p. 122).

When the Extra 51-A North was a short distance from Baton Rouge, Louisiana, there was a train owned and operated by the petitioner, known as No. 9, which was a superior train and had the clearance and right of way over Extra 51-A North. (Tr. pp. 296, 297, 298) Under the rules of the petitioner, Extra 51-A North should have taken a siding at Essen, Louisiana. (Tr. pp. 297, 298, 299) Instead of taking the siding at Essen, B. T. Moore passed Essen and later stopped and he then used the radio equipment and contacted the petitioner's operator at Baton Rouge, ordering that No. 9, the superior train, remain in the station until Extra 51-A North had arrived. (Tr. pp. 333, 334)

When Extra 51-A North left Baton Rouge and New Roads, B. T. Moore was aboard and in the cab of the engine. (Tr. p. 295) Extra 51-A North should have stopped at Batchelor, Louisiana, and taken a siding because there was insufficient time under the schedule to clear the superior train, Southern Belle No. 1 (Tr. pp. 822, 823)

Near Baton Rouge, Mack Johnson wanted to know why Extra 51-A North did not stop at Essen, and he was told by the conductor that " * * * the trainmaster was at the head end, with Yates, with a radio and he was running it up there and he didn't know what they were doing. We didn't have a radio on the hind end. There wasn't any radio back there. All in my power was to do to call the attention of the conductor when he was with and tell him of these things. He didn't stop the train, and I couldn't take over stopping the train because I am not a conductor, but I was following the rules; to take instructions from the conductor, or help in notifying him any time of these things when he was with me, and I did it." (Tr. pp. 414, 415; Rule 107).

Further, the conductor told Mack Johnson that " * * * the trainmaster was on the head end of the train; and he didn't pull the air. The trainmaster was on the head end running it, with a radio up there, and they knew what they were doing, and he didn't pull no cord. I called his attention to it." (Tr. pp. 414, 415).

Just before Extra 51-A North arrived at New Roads, on the back platform, the conductor told Mack Johnson to "watch the order board at New Roads * * * for just a few minutes * * * I am going towards the head end. You watch this end closely and watch the board at

Morganza. I am going as far as I can for No. 1, and you stay back here and watch close; check on the order board at Morganza." (Tr. pp. 416, 417).

About the time that the Southern Belle No. 1 was due out of Alexandria, the telegraph operator for the petitioner at Alexandria, Louisiana, spoke to the engineer of another train, not involved in the collision, Extra 56-A North, who was then located near Simmesport, setting forth that the Southern Belle No. 1 was eight minutes late leaving Alexandria. (Tr. pp. 123, 124, 353, 354). No one knows whether B. T. Moore and Yates, on Extra 51-A North heard this conversation.

Extra 56-A North reached Bijou at approximately 5:45 A.M. August 10, 1951, (Tr. p. 354) and about 5:50 A.M., the engineer heard someone who identified himself as Simmesport call Extra 51-A North. Southern Belle No. 1 passed right by Extra 56-A North at approximately 6:25 A.M. The engineer, Jimmy F. Mims, on Extra 56-A North, waved at Engineer Rainey on No. 1 and tried by radio to communicate with him but got no response. Between 6:53, 4, 5 and 7:00 A.M. the engineer on Extra 56-A North heard an **urgent call,** stating "Extra 51-A North; Simmesport calling Extra 51-A North." Then the engineer heard the call from Simmesport to Extra 51-A North saying "Yes, sir," "No, Sir" or "All right, sir." (Tr. pp. 353-368).

Near the time of the wreck, as Mack Johnson testified, " * * * there was no one back there but me, but with the instructions from the conductor to stay back there and watch that hind end, that he was going as far as he could go for No. 1, and after we got on past Lettsworth I noticed the time. But they kept going. They

all were on the head end somewhere. I know he left me and told me that's where he was going. He had been using the radio and I knowed it was complicated. I figured they knowed what they was doing. I didn't have nothing back there to do but try to watch the hind end as flagman. We were going around that curve, and I was looking around that curve, and then I saw this No. 1 coming around there. He was making an effort to stop. By the time I reached for the chord the brakes had been applied on and reduced the speed of the train. I stayed until I seed they were going to get together and I tried to get off the best way I could. By doing so that is where I injured myself. * * * "(Tr. pp. 418, 419).

Thus at approximately 7:02 A.M. on August 10, 1951, a collision took place (Tr. p. 418), and as the petitioner itself alleged in the *Moore* case, it was solely and only caused by B. T. Moore. Surely, the jury was correct in finding that the respondent could have done nothing to prevent the accident in view of the superior authority aboard and all of the other circumstances.

As the Extra 51-A North was going around the fatal curve, the respondent, following his usual instructions and procedure, was looking for hot-boxes (Tr. p. 418) and noted he saw No. 1 and the terrifying sight (Tr. p. 419) of the oncoming collision. After doing everything possible he did a "double summerset" and hit the ground. (Tr. p. 437)

The respondent was then treated for a very long period of time by Dr. Henry Leidenheimer, who had been Division Surgeon for the Louisiana and Arkansas Railway Company Hospital Association for approxi-

mately forty-two years. (Tr. p. 129) Further, the doctor's son was the Asst. Division Surgeon. (Pl. 3; Tr. pp. 131, 132). **Paul Sippel served as Vice-President of the petitioner and as Chairman of the Board of the Hospital Association.** (Tr. p. 130)

The original card, Dr. Leidenheimer's (Pl. 4, Tr. p. 140, 967) showed that among other ailments, the respondent suffered from nervous shock. (Tr. pp. 138, 139). Further, he had on **many** occasions certified that the respondent was suffering from ailments including **shock** and was totally disabled. He did this as late as January 25, 1953. (Nat. Life 1-26, Tr. p. 127, Pl. 27, 28, Tr. p. 430; Tr. pp. 125-127, 140, 141, 151, 152). This petitioner's physician was so fearful of his position that he said that he would not make a statement or testify as to anything that would hurt the petitioner in litigation, even though he was under oath. (Pl. 5, Tr. p. 145, Pl. 6, Tr. p. 147, Tr. pp. 156, 157). An insight as to how Dr. Leidenheimer felt will appear from the following two exhibits (Pl. 5, Tr. p. 145, Pl. 6, Tr. p. 147).

Plaintiff 5: (p. 145)

"Shreveport, La., May 23, 1953.

"Dr. Henry Leidenheimer,
Audubon Building,
New Orleans, Louisiana.

"Mr. Sippel contacted me yesterday and wanted to know why you gave Mack Henry Johnson, Brakeman who was injured in the collision at Lettsworth, a statement to the railroad Retirement Board that he needs retirement on account of 'shock and injury to his ankle.' Inasmuch as there is some litigation still pending concerning this accident, we feel that it is an official admission of you, as Division Surgeon, to give such

a written recommendation and Mr. Sippel asks that you drop me a line concerning same at your earliest convenience, in order that we may get the correct impression of the matter.

"Thanking you for your promptness in attending to this as you did for my request concerning Mr. Mills, (for which I thank you) I am

s/ A. A. Herold, Sr.,
Sincerely,
Chief Surgeon.

AAH:h
cc: Mr. P. Sippel"

Plaintiff 6: (p. 146)

"May 30, 1953.

Dr. A. A. Herold
Shreveport, La.

The communication of recent date received and carefully perused. It smacks of Nazism whereby a person is considered guilty on hearsay evidence of rumor in contrast to the American way, a man is innocent until proven otherwise. This tale is fantastic and as for the Railroad Retirement Board acting on my recommendation it is hoey, for they wouldn't care a d---.

The allegation is so vague, inexplicit and lacks substantiation that I am impelled to ask, did Mr. Sippel see such a recommendation over my signature? I too would like to see this paper.

I must confess that I do not recall every incident that has occurred in the past three years, and my railroad correspondence is too voluminous to maintain a perfect filing system.

As regards 'official admission', I have always been scrupulously careful not to do anything inimical to best interest of the railroad. In fact the attorneys for Johnson had requested a statement of his injuries and my answer to them was

that I did not regard it as proper to do so. Any information of such nature must come from the Chief Surgeon or the Claim Agent.

I was called down before by the Chief Surgeon for treating Johnson at the association's expense after he was fired, notwithstanding I had not been notified of his dismissal I still continued to treat him for, here again, for obvious reasons it would serve the company best.

If (?) I have inadvertently made such a recommendation, I am man enough to admit having done so, but I must have the proof.

Sincerely,

cc: Mr. Sipple"

Of course, Dr. Leidenheimer could not deny his findings, so the petitioner was in a position where the man it controlled could not help it, regardless of his desire. (Tr. pp. 129-177)

The testimony of the physchiatrists and Dr. Manuel Gardberg (Tr. p. 179 et seq.) is clear in showing the serious illness of the respondent (Tr. pp. 202, 255, 505). Dr. Bick, the psychiatrist, chosen by the petitioner, but later put on the stand by the respondent, substantiated the respondent's physicians. (Tr. pp. 202-210) After the petitioner did not receive its desired result from Dr. Bick it repudiated him (Tr. pp. 18-B - 18-D) and asked the Court to cause the plaintiff to be examined by another psychiatrist. This psychiatrist disagreed with the other doctors (Tr. p. 678). From a medical standpoint the evidence was clear and the jury understood everything.

The petitioner felt it necessary to attempt to impeach the testimony of the respondent. This was at-

tempted relative to immaterial issues and by the shameful testimony by Willie Webb (Tr. pp. 770-810) and Dave Mitchell (Tr. pp. 718-726). A review of this testimony will serve no purpose since we submit that when this Honorable Court reads their testimony, it will have the same reaction as the Jury.

The trial lasted five days and the facts were brought out clearly. The Jury had full knowledge of every aspect of the case.

The Jury returned a verdict in the amount of $28,000 (Tr. p. 78). On appeal to the Court of Appeals for the Fifth Circuit, the judgment was affirmed (214 F. (2d) 290). Petition for rehearing was thereafter denied.

ARGUMENT

1.

The petitioner complains that the respondent was permitted to testify as to what he had been told by the deceased conductor as to how the train was being operated by the trainmaster. (Tr. pp. 413, 414).

Petitioner sets forth in its brief that it " * * * contends that the accident would not have occurred had respondent obeyed the applicable rule * * * ." (Petitioner's Br. p. 3). It should be noted that in the case filed by Mrs. Irene Booth Moore, widow of B. T. Moore, the trainmaster who was aboard Extra 51-A North, which suit was filed in the Western District of Louisiana, the Petitioner in its answer affirmatively set forth that the sole cause of the accident was the conduct of B. T. Moore (Pl. 2; Tr. pp. 40-G, 40-H, 40-L, 40-M, and 40-N). The affirmative allegations contained in the petitioner's an-

swer filed in the Western District, subsequent to the filing of its answer in the instant case, were never rebutted. In fact the record shows that they were proven. See *Lehigh Valley R. Co. v. Allied Machinery Co. of America* (CCA 2nd 1921) 271 Fed. 900, 902; *Pope v. Allis*, 6 Sup. Ct. 69, 115 U.S. 363, 29 L. Ed. 393 (1885); *White v. Mechanics Securities Corporation*, 46 Sup. Ct. 116, 269 U.S. 283, 70 L. Ed. 170 (1925); *Hyman v. Wheeler*, 29 Fed. 347 (1886); *General Electric Company v. Jonathan Clark & Sons*, 108 Fed. 170 (1901); *Kingley Jarnvagsstyrelson v. Dexter & Carpenter*, 32 F. (2d) 195 (CCA 2nd 1929); *Rogers v. Edward L. Burton & Co.*, (CCA 10th 1943) 137 F. (2d) 286; *U. S. v. Continental American Bank & Trust Company*, (D.C. W.D. La. 1948) 79 F. Supp. 450.

One of the major arguments of the petitioner in defense of its case in the District, Circuit and now this Honorable Court is that the respondent did not cause the train to stop shortly before the accident. The petitioner contends that the respondent's alleged action was the sole cause of the accident. (Tr. p. 14). It was proper for the respondent to show the circumstances at the time of and shortly before the accident in order to rebut this contention. For this reason respondent elicited the testimony concerning conversations had between the respondent and the deceased conductor, Marcotte.

The train on which the appellee was riding was Extra 51-A North, a troop train going from New Orleans, Louisiana, to Shreveport, Louisiana. On board the train were B. T. Moore, a trainmaster who, as such, was in charge of all operations of all trains, (Tr. p. 404) J. W. Sandifer, (Tr. p. 405) the conductor, (Tr. p. 404) the engineer, (Tr. p. 405), the front brakeman, (Tr. p.

405) the flagman, (Tr. p. 405) and the respondent, Mack Henry Johnson, the rear brakeman.

The respondent proved that B. T. Moore, the trainmaster for the petitioner, was riding the engine of the train on which the respondent was a member of the crew at the time of his injury. (Tr. pp. 40-E, No. 7, 40-L, No. 7).

After Extra 51-A North violated the rules in not taking a siding at Essen, Louisiana, so that Train No. 9, which had the right of way, could go through, (Tr. p. 407) the respondent inquired of the conductor as to the reasons and was told:

> "Why the train didn't take the siding at Essen? Because the conductor said to me, the trainmaster was on the head end, with Yates, with a radio and he was running it up there and he didn't know what they were doing. We didn't have any radio on the hind end. There wasn't any radio back there. All in my power was to do to call the attention of the conductor when he was with and tell him of these things. He didn't stop the train, and I couldn't take over stopping the train because I am not a conductor, but I was following the rules; to take instructions from the conductor, or help in notifying him any time of these things when he was with me, and I did it." (Tr. p. 414).

According to the operating rules of the railroad, the personnel aboard the train are to take orders from the conductor. (Tr. pp. 464, 465). In addition, the trainmaster, who is responsible for all train orders, was aboard the train. In view of the presence of the conductor and the trainmaster, the conversations, which occurred shortly before the wreck at Lettsworth, become

extremely important. These conversations which the petitioner testified to, concern the orders given to him by the conductor, and, further concern the information given to the petitioner that the train was being run by the trainmaster and that the train was proceeding by the use of the radio. (Tr. pp. 406, 411, 412, 413, 414)

We believe that there are many reasons why petitioner's contention before this Honorable Court is erroneous. The Fifth Circuit Court gave the clearest answer as follows (214 F. (2d) 290, 292, 293):

> "Appellant strenuously insists that the court erred in permitting the respondent, over the petitioner's objection, to relate his conversation with the conductor, afterward killed in the accident, when the northbound train stopped a few miles south of Baton Rouge. The train was due to take a siding at Essen, Louisiana, for still another train of the petitioner known as No. 9, which was a superior train and had the clearance and right-of-way over the northbound train. Instead, the train passed the siding at Essen and later stopped, at which time Mr. B. T. Moore, the trainmaster, used the radio equipment to contact the petitioner's operator at Baton Rouge and to order that No. 9, the superior train, remain in the station until the northbound train had arrived. Over the petitioner's objection, the respondent was permitted to testify that he asked the conductor, who was later killed in the accident, why the northbound train did not stop at Essen, and was told by the conductor that the trainmaster was with the engineer at the head of the train, had a radio and was running the train up there, and that they knew what they were doing, but the conductor did not. That conversation, we think, was admissible as circumstantial evidence going to show the method of operation of the train on this fatal journey by the trainmaster. It was really a verbal act rele-

> vant to be considered in determining a negligence *vel non* and the degree thereof on the part of the conductor and also on the part of the respondent. VI Wigmore on Evidence, 3d. ed., Sections 1714, 1715, 1788, 1789; *Petroleum Carrier Corp. v. Snyder*, 5th Cir., 161 F. 2d 325; *Reading Co. v. Larkin*, 3d. Cir., 114 F. 2d 416." [1]

Further, we submit that this testimony is admissible on the ground that it constituted an admission by an agent of the railroad in the scope of his employment as to the method of operation of the train by the trainmaster, B. T. Moore, and the conductor and for the further reason that it formed a part of the *res gestae.*

In the case of *Reading Company v. Larkin*, 114 F. 2d 416 (3rd Cir. 1940) an analogous situation to the case at bar was discussed. In this case, the injured employee testified as to instructions given him by the conductor on the morning of the accident. The appellant in that case contended that the Court erred in admitting this testimony on two grounds: (1) hearsay, and (2) because the statement made by the Conductor was not within the scope of his authority and therefore not binding on the railroad. The Court said on page 419:

> "When illustrative of a particular litigated act, testimony with respect to circumstances which are the undersigned incidents of the litigated act, is admissible, although hearsay, as part of the *res gestae. Coll v. Easton Transit Co.*, 180 Pa. 618, 626, 37 A. 89, 90. The qualifications which render the incidents of a litigated act admissible

[1] The petitioner in its brief at page 4 cites several cases, e.g. *Hill v. A. J. Canfield Co.*, 157 F. (2d) 849 (C.C.A. 7th). That case, as well as the other cases concern the question as to whether testimony is admissible solely because the declarant is dead. They do not deal with *res gestae* nor with any of the other grounds mentioned by respondent and the Circuit Court of Appeals. Further, in the *Hill* case the testimony was specifically excluded by an Illinois statute.

are 'that they are part of the immediate preparations for or emanations of such act, and are not promoted by the calculated policy of the actors.' *Coll v. Easton Transit Co., supra.* Here the particular litigated act was the plaintiff's participation in the movement forward of commerce in transit between states. The conductor's statement with respect to the placing of the empty coal car in immediate preparation of the movement of the cargo was, therefore, admissible as a part of the *res gestae.*"

In the case of *Norwich & New York Transportation Co. v. John Flint,* 13 Wall. (U.S.) 3, 20 L. Ed. 556, 557 (1872) the plaintiff was injured aboard a boat, which carried a detachment of U. S. Soldiers. Testimony was allowed by the lower court to the effect that they heard a sergeant reporting to an officer that the men aboard the boat were getting out of hand and that the officer replied that the sergeant mind his orders. Shortly thereafter, the plaintiff was injured by a shot fired by one of the soldiers. The testimony was offered for the purpose of proving the condition of affairs aboard the boat. The Court said:

> "It is hardly necessary for us to enter into a lengthy discussion on the admissibility of the testimony in question. The opinion of the circuit court which has been laid before us, is sufficiently full on the subject, and need not be repeated. We have no hesitation in regarding the incident testified to as part of the *res gestae,* and as entirely competent for the purposes for which it was offered. The statements of the sergeant were not offered in evidence for the purpose of proving the facts stated by him, but the whole incident (including those statements) was adduced in evidence for the purpose of showing the manner in which the officers attended to their duty whilst the disturbance was going on; the fact that notice

> of its progress was communicated; the time that it continued, and the degree of alarm it was calculated to excite in such a person as the sergeant appeared to be. These were substantially the purposes for which the evidence was professedly offered, and for these purposes, as part of the *res gestae*, it was clearly competent."

If this Honorable Court should find that there was any possible reason for exclusion, then any conceivable feature of hearsay was cured by the cross-examination by the petitioner on the same subject of the respondent himself and by the examination by the petitioner of its witnesses. (Tr. pp. 626, 627). *Bevard v. Bevard*, 103 F. Sup. 533 (D.C. D.C. 1952); *United States v. Gruber*, 123 F. (2d) 307 (2nd Cir. 1941); and *Trouser Corporation of America v. Goodman & Theise, Inc.*, 153 F. (2d) 284 (3rd Cir. 1945).

2.

Petitioner complains in its brief that the District Court acted improperly in excluding the respondent's prior work record and attaches as an exhibit the entire work record of the respondent while in the petitioner's employ. Among other defenses raised by the petitioner in this case, is the contention by the petitioner that the respondent, Mack Henry Johnson, suffered from neurosis before the accident which is involved in this litigation and that the traumatic neurosis which is complained of here is merely an aggravation of a previously existing neurosis. The petitioner contends in its brief that the work record is material and relevant to the issue of whether or not the respondent had a pre-existing neurotic condition. That portion of the work record which the petitioner desired to introduce concerned various reprimands and demerits given the respondent, the first of

which was given in 1924 and the last of which was given in 1949. (Tr. p. 477) Respondent contends that none of these incidents has any connection with the present accident and is irrelevant and immaterial on all issues involved in this matter.

There can be no contention by the petitioner that the previous acts of the respondent are indicative of any past negligence on the part of the respondent which would have a bearing on the issues in this case.

In the case of *Thompson v. Bowie*, 4 Wallace 463, 18 L. Ed. 423, 426 (1867), there was an attempt to show that the maker of a note had a habit of gambling when drunk. The purpose of this testimony was to create the basis for the defense that the money was loaned for the purpose of a gambling debt and therefore illegal. The Court excluded this testimony and gave the following reason:

> "All evidence must have relevancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of Thomas F. Bowie to gamble, when drunk, legally tend to prove that he did gamble on the day the notes were executed? The general character and habits of Bowie were not fit subjects of injury in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proofs to meet such evidence. That Bowie gambled at other times, when in liquor, was surely no legal proof that because he was in liquor on the first day of January, 1857, he gambled with Steer."

In the case of *Louisville & Nashville R. Co. v. M'Clish*, 115 F. 268, 275 (CCA 6th 1902), the Court was asked to decide whether it could properly receive evidence as to the deceased's habit of jumping on trains near the

place where the body was found. The Court held, in excluding this evidence, as follows:

> "The learned counsel for plaintiff in error admit the general rule to be that testimony offered for the purpose of establishing contributory negligence of the deceased, like other testimony, must be limited to proving facts existing at the time of the happening of the injury complained of. It is contended, however, that when there is no eyewitness to the occurrence, and the manner of its happening is to be left to circumstantial evidence alone, it is competent to show the habit of the deceased in the respect of doing the thing which it is claimed he did at the time of receiving his injury. The argument is, proof of habit to do the thing in question renders it more likely that it was done at the time in controversy. There are not lacking authorities to support this view, but we think the better rule is that such testimony tends to raise collateral issues, the beget uncertainty and false inferences from events which have no bearing upon the real issues. A man may be careful upon one occasion and careless upon another. It is not fair deduction to say that because the deceased sometimes boarded trains in motion that, therefore, he was attempting to board a train when killed. Such testimony, tending to show contributory negligence, could be met with other testimony tending to show that such was not his habit, and the attention of the jury would be diverted from what happened on the occasion of the injury to the consideration of the character and habits of the deceased at other times. We think the testimony should be confined to the conduct of the deceased in the particular instances under investigation in the light of the facts competent to be directly or circumstantially proved."

If counsel for petitioner were permitted to introduce into evidence the irrelevant and immaterial evidence as

to the entire work record, the trial of this matter, which took five days, would have extended over several more days, since it then would have been necessary to have a trial on each one of the particular charges made in the work record.

There have been numerous cases in which parties have tried to introduce records which were made by one of the parties to the accident as evidence of the facts surrounding the accident or event in dispute. In these cases the courts have properly held that such testimony is not admissible in evidence since it is hearsay on top of hearsay. In the case of *Universal Airline v. Eastern Air Lines*, 188 F. (2d) 993 (1951), the court was considering whether or not a report of the Civil Aeronautics Board as to the details surrounding an accident was properly admissible in court as evidence. The court held:

> "The reports of *ex parte* hearings and investigations are generally excluded, not because of danger of 'usurpation of the jury's function' but because the evidence is improper and irrelevant, even if the hearing is before a judge sitting without a jury. Such reports, or testimony concerning such reports, would be hearsay based on hearsay. The rights of parties are to be determined by testimony adduced at the trial according to the rules of examination and cross-examination."

See also *Good Holding Co. v. Boswell*, 173 F. (2d) 395 (CCA, 5th 1949) and *Hubsch v. United States*, 174 F. (2d) 7 (5th CCA, 1949).

We submit that the work record which petitioner sought to introduce in this case is in no different position than the records described in the cited cases, with the exception that the work record concerns numerous events.

If the record of one event, is not admissible, then, we submit, *a fortiori*, the introduction into evidence of the work record would merely be a cumulation of errors. Further, in line with this thought, the record of the investigation by the Interstate Commerce Commission and its findings and conclusions in reference to the instant collision could not be referred to or introduced into evidence by the respondent. The fact that Mack Henry Johnson had been employed by the L & A Railroad constantly since December 15, 1919, should be sufficient in itself to show that the petitioner considered the respondent an able and conscientious employee. In fact, it is impossible to conceive of the petitioner keeping an employee in service, when the public interest is involved, if it did not have that view.

3.

The petitioner objects to several doctors reciting the history of the illness as given to them by the respondent. This recitation included certain facts about the accident.

First it should be pointed out that the petitioner did not object to the evidence on the ground of hearsay, " * * * but the sole complaint, was to the repetition of appellee's statements, a matter resting, we think, within the sound discretion of the district judge." As further stated by the Fifth Circuit Court, " * * * the appellant did not object to such history as given by the first doctor who testified, but did object to its continued repetition * * * ." (214 F. (2d) 290, 293).[2]

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[2] The issue in the instant case was not presented in any of the cases cited by the petitioner in its brief on page 8, footnote 30. The *Sparf* (156 U.S. 51, 39 L. Ed. 343) and *Carver* (160 U.S. 553, 40 L. Ed. 532) cases involved criminal prosecutions where serious and apparent errors were made. The *Nudd* case (91 U.S. 426, 23 L. Ed. 286) on appeal solely considered the objection as made.

It must be noted that the respondent was suffering from traumatic neurosis (Tr. pp. 255-259, 505-517) and impotency, (Tr. pp. 255-259, 505-517, 211-217) among other ailments. In such a case it is indispensible that the subjective symptoms of which the party complains should be known by the physician in order for him to give an opinion. The portion of the history which related to the train wreck itself had to be known by the doctors in order for them to understand the basis for the respondent's traumatic neurosis (Tr. pp. 205, 276, 511). If such information could not be given to the physician and later set forth by the physician in court it would be impossible for any individual suffering from a traumatic neurosis to prove his case.

In the case of *Kaufman v. Kaufman*, 164 F. (2d) 519 D.C. C.A. 1947), the plaintiff asked for an annulment of her marriage on the grounds of impotency on the part of the husband. The husband was examined by a psychiatrist who found that he was suffering from psycho-neurosis. The question before the court was whether or not the doctor should be allowed to give his opinion as to the matrimonial capacity of the husband at the time of his examination since the answer to be given would be based on statements made by the husband himself. The court said on page 520:

> "The courts have long recognized the fact that impotence is frequently the result of phychogenic causes. Indeed one medical authority states that most cases of impotence seen by urologists are of the psychic type rather than the result of physical defects. The same authority says that in some such cases individuals who have imagined and convinced themselves that they are impotent may by the force of such mental conviction be unable

to perform the sexual act although in reality nothing but their state of mind prevents them from doing so. In diagnosing such a subjective condition the physician must necessarily rely largely upon the history and symptoms described to him by the patient. Accordingly it was proper for Dr. Klein to base his diagnosis as to the defendant's impotence upon the history and symptoms which the latter related to him and the trial justice should have permitted him to answer the question propounded to him."

In the case of *Peters v. Mutual Life Insurance Company of New York*, 107 F. (2d) 9 (3rd Cir. 1939), a doctor was allowed to give his opinion as to the cause of the injury in a case of cardiac neurosis where he did not state the case history on which his opinion was based. The court, in holding that this opinion was not properly admissible, stated on page 12:

"In the case at bar, the plaintiff-appellant's expert balked at basing his opinion on certain specific and enunmerated symptoms. He then volunteered to and did base it on the medical history of the case. He was not even asked to give that history and his entire opinion becomes therefore clearly inadmissible."

* * * * *

"Unfortunately for the plaintiff-appellant this logic does not extend to cover the circumstance of the principal case. We are not dealing with personal knowledge of the patient's symptoms, examination) alone, but with personal knowledge of the patient's statement of those symptoms (history) as well. Under the adversary system the failure of a cross-examiner to expose the basis of a physician's opinion may imply an acknowledgment that the underlying data or premises are

present and warrant it. This assumes, of course, that there is no other reason for such failure to cross-examine. It is just here, we think, that the distinction between medical examination and medical history exists. As we have seen, the admissibility of the latter depends on a not altogether clearly defined exception to the hearsay rule. 3 Wigmore on Evidence, 2d Ed., Section 1720. The cross-examiner's failure to pry into the expert's premises may therefore indicate merely his uncertainty, an uncertainty whose cure by way of charge to the jury would result in confusion and complexity and would defeat Dean Wigmore's conception of practicality. We might add that the history of a disease dependent largely on mental processes is about as far removed from a physician's direct physical examination as could be conceived."

It is important to note that the doctors, in stating their opinions as to the type of illness suffered by the respondent in this case, did not rely solely on the subjective symptoms elicited to them by the respondent. For example, Doctor John W. Bick, Jr., the psychiatrist who was chosen by the petitioner to examine the respondent (Tr. p. 40-A), then repudiated by the petitioner (Tr. pp. 18-B, C, D), but put on the stand by the respondent so that the jury could get the complete picture (Tr. p. 202), stated (Tr. p. 203):

> "Physically, the patient appears to be a well developed, well nourished, negro male of sixty-five. I thought for the most part his conversation was slow and I had some difficulty in eliciting responses. He walks with a slight limp as though sparing the right leg. He seems somewhat depressed, rather disinterested in his surroundings, complains mostly of feelings of despondency, sleep difficulty, headaches, and nightmares." (Tr. pp. 203 and 204)

The respondent was present in court, testified on direct and cross-examination. The testimony as to the history of his illness was substantially the same as he gave to each of the doctors who examined him. It might be pointed out that the respondent was subjected to an examination by five doctors chosen by the petitioner (Tr. pp. 202, 631, 647, 678, 761) excluding Dr. Leidenheimer who was under the petitioner's control and who treated the respondent for a long period of time and whose diagnosis in all written reports confirmed the respondent's position. (Tr. pp. 136-142) During the trial the petitioner had the right to cross-examine the respondent as to any of the facts which he had given to the doctors. Under said circumstances, it is inconceivable that the petitioner can complain as to the history received by the various doctors, which history was indispensible for them to know in order for their opinions to be given. The petitioner must have recognized that in a case of this sort, the testimony of the doctors as to the case history is properly admissible and must necessarily be given since he made no objection to such history given by Dr. Manuel Gardberg, the first doctor who testified, (Tr. p. 179) and in examining doctors employed by the petitioner and on cross-examination of doctors employed by respondent he asked them to give the history (Tr. pp. 190, 191, 218, 219, 260, 266, 274, 518, 525, 636, 638, 648, 649, 650, 685, 761, 762, 763) as given by the respondent insofar as they needed to give the history to form an opinion in this matter. Such testimony is properly admissible and should be given its proper weight since counsel for the petitioner asked for the same testimony of the same or previous witnesses. *Bevard v. Bevard*, 103 F. Supp. 533 (D.C. D.C. 1952); *United States v. Gruber*, 123 F. (2d) 307 (2nd Cir. 1941);

Trouser Corporation of America v. Goodman & Theise, Inc., 153 F. (2d) 284 (3rd Cir. 1946).

It should be pointed out that the respondent was examined approximately eleven times by Dr. Edward H. Knight and Dr. Max E. Johnson. Dr. Max E. Johnson, in his direct testimony, stated that if there was any chance of feigning illness on the part of the respondent, such action would have been discovered during the course of the eleven interviews. (Tr. p. 515). In addition, the appellee was sent to Dr. Johnson and Dr. Knight for the purpose of treatment. (Tr. p. 266) It is a well settled rule that the history given to a doctor for the purpose of treatment is properly admissible in court and is an exception to the hearsay rule. See: *U. S. v. Calvey*, 110 F. 2d 327 (3rd Cir. 1940); *Bartkoski v. Pittsburgh & Lake Erie R. Co.*, 172 F. 2d 1007 (3rd Cir. 1949).

In conclusion the respondent submits that the history as given by the respondent to the doctors was properly admissible as an exception to the hearsay rule. If it is not an exception to the hearsay rule, respondent contends that it was still properly admissible on the grounds that the petitioner did not object to such testimony on the ground that (1) that it constituted hearsay, and (2) that the appellant asked for the same history from his own doctors and asked questions in direct and cross-examination of witnesses in which they would necessarily have to give portions of the history, thus waiving any objection which he might have.

CONCLUSION

The judgment below is correct, and there is no conflict of decisions. We therefore respectfully submit that

the petition for writ of certiorari should be denied.

Respectfully submitted,

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